INDIANS AND THE LAW.

THE American student could select few single subjects the survey of which would bring under view a greater variety of important general principles, or afford more scope for forensic reasoning in the application of such principles, than the law relating to Indians. The progress of events has given additional interest at the present day to many of the questions thus presented.

A large part of the Indians in the United States are now upon great reservations between the Mississippi and the Rocky Mountains. The advancing tide of Western immigration, before which they have been removed thither, is pressing upon them; and to the task of keeping these Indians within the boundaries of their reservations — which has long required an army — has been added the task of keeping the white men off the reservations, a task which no army can continuously perform.

The necessity of law for the Indians, for their own protection and welfare, is now obvious. The necessity of it for the protection and welfare of the white population and the peaceful administration of State and Territorial government is equally obvious.

The reader who is inclined either to trace the history of the legal relations of the Indian in this country, or to inform himself of the present status of the Indian before the law in what is known as the Indian country at the West, and the pending modifications of that law, will find it convenient to note that the principles now in operation have been gradually developed by a process which may be conveniently distinguished in three successive but contrasted periods, which lead up to a fourth period, upon which we are now entering.

For more than a third of a century after the adoption of the present Federal Constitution, and indeed down to the year 1829, our government continued to act under the traditions of the time when white colonists were contending with the red men for possession of the continent, and, so far as relations were pacific, dealt with them upon the principles of international law which civilized states usually adopt in dealing with uncivilized states. During

this period our courts constantly asserted our title to the soil by right of discovery, and extended that claim, territorially, as fast as the progress of colonization and emigration carried the advancing line of white settlement westward. (See 3 Kent's Commentaries, 378–400; Note on the Sources of American Colonial Law, 17 Abbott's New Cases, 486–491.) But at the same time the Executive dealt with such tribes under the forms with which it dealt with foreign nations, and defined their rights by treaties supposed to be subject to the rules governing treaties between equal sovereign states. The basis upon which such treaties were made is very lucidly indicated by Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States in the case of the United States *v.* Kagama (118 U. S. 375, 381), as follows: —

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

"Following the policy of the European government in the discovery of America toward the Indians who were found here, the colonies before the Revolution, and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase, by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the State within whose limits they resided.

"Perhaps the best statement of their position is found in the two opinions of this court by C. J. Marshall in the case of the Cherokee

Nation *v.* Georgia, 5 Peters, 1, and in the case of Worcester *v.* State of Georgia, 6 Peters, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin in the former is a very valuable *résumé* of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

"In the first of the above cases it was held that these tribes were neither states nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them."

This recognition, however, of Indian tribes as bodies politic, in the nature of independent states, never conceded their title to the soil, but only a permissive occupancy. From the first, the title to land in Indian occupancy has always and consistently been maintained in the government. This fundamental doctrine has recently been clearly stated by Mr. Justice Field, in delivering the opinion of the same court in the case of Buttz *v.* Northern Pacific Railroad Co. (119 U. S. 55, 66), in determining the effect of a government grant to the railroad company of lands in the occupancy of Indians, followed by the surrender of the Indian right of occupancy to the government. He says: —

"At the time the act of July 2d, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in Beecher *v.* Wetherby: 'It is to be presumed that in

this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government.' (95 U. S. 517, 525.) In support of this doctrine several authorities were cited in that case.

"In Johnson *v.* McIntosh (8 Wheaton, 575), which was here in 1823, the court, speaking by Chief Justice Marshall, stated the origin of this doctrine of the ultimate title and dominion in the United States. It was this: that, upon the discovery of America, the nations of Europe were anxious to appropriate as much of the country as possible, and, to avoid contests and conflicting settlements among themselves, they established the principle that discovery gave title to the government by whose subjects or by whose authority it was made, against all other governments. This exclusion of other governments necessarily gave to the discovering nation the sole right of acquiring the soil from the natives, and of establishing settlements upon it. It followed that the relations which should exist between the discoverer and the natives were to be regulated only by themselves. No other nation could interfere between them. The Chief Justice remarked that 'the potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New, by bestowing on them civilization and Christianity in exchange for unlimited independence.' Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. The Chief Justice adds, that the history of America, from its discovery to the present day, proves the universal recognition of this principle.

"In Clark *v.* Smith (13 Peters, 195), which was here in 1839, the patent under which the complainant became the owner in fee of certain lands was issued by the Commonwealth of Kentucky

in 1795, when the lands were in possession of the Chickasaw Indians, whose title was not extinguished until 1819. It was objected that the patent was void because it was issued for lands within a country claimed by Indians; but the court replied, 'That the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the States of this Union after the Revolution, were made for lands within the Indian hunting-grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the Revolutionary war by such grants, and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States but by others. The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee. So this court and the State courts have uniformly and often holden.' (13 Peters, 201.)"

The growing power and necessities of civilization and the waning numbers and needs of the Indians led to what may be noted as the second period of our Indian history, the commencement of which is marked by the administration of Andrew Jackson,—a period continuing from 1829 to 1871, which may be characterized as the period of compulsory emigration under the form of consent by voluntary treaty. These treaties were made under the same form and theory of law as those of the preceding period, and abound in provisions for annuities, rations, aid toward agriculture and education, and various other considerations given or promised as an equivalent for removal and for accepting a limited reservation for occupancy.

During this period, whatever cruelties may be chargeable to the executive and legislative course of the government, the courts have always continued to maintain, to the full extent of the judicial power,— which is necessarily limited to litigated cases coming before it,— the obligations of good faith as due from the government to the Indian people, and to declare those obligations not diminished, but rather emphasized, by the changed conditions of the time. The course of decision on this subject I cannot better indicate

than in the language of Mr. Justice Matthews, in delivering the opinion of the court in the case of the Choctaw Nation *v.* The United States (119 U. S. 1), where a claim of that tribe under the treaty of 1830 and subsequent dealings, which had been disallowed by the Court of Claims, was brought before the Supreme Court by appeal, and there sustained. He says :—

"The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative powers.

"As was said by this court recently in the case of the United States against Kagama (118 U.S. 375, 383) : 'These Indian tribes *are* the wards of the nation ; they are communities *dependent* on the United States ; dependent largely for their daily food ; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection ; because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this court, whenever the question has arisen.'

"It had accordingly been said in the case of Worcester *v.* The State of Georgia (6 Peters, 582) : 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter

sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

During this second period, however, the power of the *Executive* directly or indirectly to control the Indians by keeping them upon the reservation, and, so far as necessary for the interests of the government, maintaining order there, was fully recognized and established; and this stage of progress naturally led to what we may indicate as the third period, continuing from 1871 to 1886–7,— the period of confinement on reservations under executive control. The commencement of this period is marked by the statute of 1871 (U. S. R. S. section 2079) putting an end to the power of the Executive to make treaties with Indian tribes; and the consummation of the period in 1886 is marked by the final and conclusive establishment of the *Legislative* power over Indians as individuals, by the decision of the Supreme Court of the United States in the case already mentioned of the United States *v.* Kagama. It was there held in effect that it is competent for the United States to make a criminal code for Indians upon their reservations; and by parity of reasoning it is equally true that the United States may pre-

scribe a system of civil law for them. The point immediately in question was the validity of the act of March 3, 1885, section 9 (33 U. S. Stat. at L. 385), punishing murder committed by one Indian upon another on a reservation within a State. It was held that while the government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pupilage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of Congress, because they are within the geographical limits of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact. And that the States have no such power over them as long as they maintain their tribal relation; for they owe no allegiance to a State within which their reservation may be established, and the State gives them no protection.

The results thus reached introduced the period which we are now entering, which we may designate as the period of fully recognized legislative and judicial power over the Indians as individuals, a period which has been fitly commenced by the several bills promoted by Senator Dawes, notably the bill for the allotment of lands in severalty. During this period, therefore, we already see, and are more fully to see, the Indians subjected to legislation; allowed and even required to accept ownership of land in severalty in lieu of tribal occupancy; granted the privileges of citizenship; and, whether they will accept those privileges or no, subjected to some, at least, of the burdens of citizenship. Many practical questions of difficulty will doubtless present themselves in reconciling citizenship and individual title with the restrictions of the surviving agency régime. But the principles which the beginning of the present period sees in operation must sooner or later put an end to that régime; and the ultimate objective point to which all efforts for progress should be directed is to fix upon the Indian the same personal, legal, and political status which is common to all other inhabitants.

To promote this result is the object of the bill entitled "An Act to establish courts for the Indian on the various reservations, and to extend the protection of the law of the States and Territories over all Indians, and for other purposes," now before the United

States Senate, — a bill deservedly known as the Thayer Bill, from the fact that its original suggestion and its outline and the maturing of its provisions in detail are chiefly due to the labors of Professor James B. Thayer, of the Harvard Law School.

In the present situation to which the course of events just described in outline has led, there are immense areas of land within the United States, belonging to us as a nation, and inhabited by a considerable population, which are now in a condition of lawlessness, mitigated only by arbitrary power. The act of 1885, already referred to, and several other recent statutes, have begun to create exceptions to this statement; but with very slight qualifications in view of such exceptions, it remains true that the most thorough-going anarchist may find the state of society which he desires to establish already in existence upon the reservations. If justice to the Indians would allow it, banishment to a reservation might be the most fitting punishment for a convicted anarchist.

If the numbers or the property of Indians were decreasing, it might be well to consider whether time might not be trusted to put an end to the shameful condition of lawlessness which the government is now maintaining, and, for the lack of proper legislation, is compelled to maintain. But the most careful investigations recently made show that the Indians are increasing in numbers; and a very slight familiarity with the subject will satisfy any one that the property rights of Indians and the pecuniary value of those rights are increasing very rapidly. So far from being "a vanishing subject," the necessity of law for the Indians is one steadily growing, in a geometrical ratio, and it is growing in importance for the whites as well as for the Indians.

Difficulties inherent in the subject will undoubtedly embarrass any attempt to supply this imperative want. The extent of territory and the comparative sparseness of population make the administration of civil or criminal justice expensive; the ignorance of civilized usages and forms of procedure, under which such a people must labor when first subjected to civilized justice, and the antipathies of race and the animosities of warfare, must deprive trial by jury of much of the effectiveness and the confidence necessary to its usefulness; and, perhaps still more serious than these difficulties, the exemption from taxation for many years to come accorded to lands owned by Indians in severalty, while intended to protect

them from fraud and improvidence in the earlier years of citizenship, makes it impracticable to require Indians to do their part in the ordinary methods of local government for the maintenance of courts and police, the establishment of highways and schools, or any other incidents of local self-government. These and similar features of the present status of the Indian seem imperatively to require some special provision for the administration of civil and criminal justice during the period which must elapse before he can be left to stand upon the same footing with other inhabitants of the State or Territory in which he may be.

This period must necessarily be considerable. It will take a considerable number of years to complete the process of optional allotments by which Indians are made citizens. Additional time will be needed for compulsory allotments. After allotments are made, a quarter of a century must be allowed before the lands can all be subjected to taxation, and, therefore, before the State and Territorial courts can be expected to bear the burden of administering justice to Indians and whites without distinction.

It is to the necessities of justice during this period that the bill addresses itself.

The clauses of the Dawes Bill as to the citizenship and civil rights of Indians are as follows (24 U. S. Stat. at L. 390, section 6, act of February 8, 1887, ch. 119) : —

"Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians, to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has

been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian or tribal or other property."

It is the object of the first clause of the Thayer Bill to add to the grant of citizenship secured by the Dawes Bill an immediate guarantee to all Indians not citizens, and whether residing on or off a reservation, of the full protection of the law, and to enable them to sue and be sued in all courts, and make contracts and engage in any trade or business, subject, however, to such reasonable restraint as is necessary to maintain order upon the reservation while the reservation system may continue. This seems to be an important and immediately feasible step towards putting the Indians as soon as possible under the same laws as the whites.

The second section is intended to provide qualification which in practice is found necessary, upon the strict rule of the Dawes Bill, that Indian contracts relating to their lands shall not be valid. As the law stands, if an Indian having accepted an allotment becomes aged or unable to work, or dies leaving infant heirs, his land cannot lawfully be leased nor any contract made to secure the value of its use or occupation.

The third object of the bill, declared by section 3, is the immediate extension over every reservation of the civil and criminal laws of the State or Territory in which it is situated, with saving clauses deemed necessary to provide against the contingency of local legislation unfavorable to Indians. This extension of law over the now lawless domain is the corner-stone of the bill. The previous provisions are incidental, connecting what has already been enacted with this great and vital declaration that hereafter no Indian and no part of the territory of the United States shall be deemed to be without the law.

Inasmuch as the considerations already explained render it utterly impracticable for a long time to come to rely upon State or Territorial courts for administering the law among these now lawless people, the next clauses of the bill provide for the creation of commissioners' courts, to have jurisdiction in all cases, civil and criminal, not capital, between Indians, or Indians on the one side and whites upon the other, or in which Indians are concerned as prosecutors or accused, and to have jurisdiction, also, of dece-

dents' estates, trustees, and guardians. These provisions are founded on the obvious expectation that the creation of property rights in Indians and the right of contract will necessarily lead, on a considerable scale, as it has already begun to do, to the same questions and differences requiring judicial adjustment which civilized life always involves.

It is an axiom in our free government that the existence of remedies is essential to the enjoyment of rights; and nothing is clearer in the problem of the future of the Indians than that adequate means, accessible and comparatively inexpensive to them, for the peaceable adjustment of questions of property, contract, and domestic relations, are absolutely essential in order to foster and promote their civilization and good citizenship. Any suggestions which can render such a system of tribunals more simple, more easily accessible, more efficacious, and more inexpensive will doubtless be welcome; but the complexity or expensiveness of a system of tribunals for such sparse and ignorant communities of people of hitherto lawless habits is not to be measured by comparing it with the inexpensive justices' courts which a New England town maintains by self-imposed taxes. It is to be measured by comparing it with the standing army now necessary, every man of which, in the Indian country, costs, by official computation, $1,000 a year.

Section 8 provides for the appointment of committing magistrates for each reservation, exercising powers in aid of the jurisdiction of the courts mentioned in the previous clauses.

Inasmuch as the powers of courts of special and limited jurisdiction are strictly construed, and do not, without express authority, include the inherent powers of courts of general jurisdiction, it seems wise to provide expressly that these courts may exercise the power which a court of equity has always had, to allow a person, from any cause incompetent to protect his own rights, to appear by next friend; and in view of the great proportion of cases in which incompetency of Indians would render a similar safeguard necessary to secure justice, and the expense of providing for separate appointments in every case, provision is made by section 9 for a standing next friend, to be paid by the government, and to act as a next friend in a court of equity does, on behalf of any Indian needing such assistance.

It would seem as if a statement of these provisions, in view of the situation, sufficiently manifests their general wisdom and necessity. No enlargement of the arbitrary powers of the Indian agent can meet the case, no extension of the jurisdiction of State or Territorial courts can do so, while the great body of Indian lands are exempted from taxation. The only alternative presented is between immediate provision at the expense of the United States for the accessible administration of justice according to local law, or according to a federal code to be provided for the purpose upon all the reservations, or, on the other hand, the continued sanction, by our government, of lawlessness and anarchy over extended Territories which belong to us, and among a people who are the wards of the nation, and for whose government according to civilized methods the nation is fully clothed with power.

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